NO. 22024

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

LAWRENCE JOHN MINASIAN,

Appellant,

vs.

CAPT. PAUL R. ENGEL,

Appellee.

APPELLANT'S OPENING BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

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JURISDICTIONAL STATEMENT

Appellant sought a writ of habeas corpus in the District Court. Authority to grant the remedy sought is specifically conferred upon the District Court by the provisions of 28 U.S.C. §2241, which reads as follows:

> "(a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. The order of a circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had.

"(b) The Supreme Court, any justice thereof, and any circuit judge may decline to entertain an application for a writ of habeas corpus and may transfer the application for hearing and determination to the district court having jurisdiction to entertain it.

"(c) The writ of habeas corpus shall not extend to a prisoner unless -

(1) He is in custody under or by color of the authority of the United States or is committed for trial before some court thereof; or

(2) He is in custody for an act done or omitted in pursuance of an Act of Congress, or an order, process, judgment or decree of a court or judge of the United States; or

(3) He is in custody in violation of the Constitution or laws or treaties of the United States; or

(4) He, being a citizen of a foreign state and domiciled therein is in custody for an act done or omitted under any alleged right, title, authority, privilege, protection, or exemption claimed under the commission, order or sanction of any foreign state, or under color thereof, the validity and effect of which depend upon the law of nations; or

(5) It is necessary to bring him into court to testify or for trial." (emphasis added)

Appellant, at all times [1] since February 23, 1966, has been on active duty with the United States Navy (Tr. I, p. 68 [2]). As such he is "in custody" within the requirements of the said statute. Orloff v. Willoughby, 343 U.S. 83, 76 S. Ct. 534, 97 L. ed. 842 (1952).

The custody is alleged to be in violation of the laws and Constitution of the United States in that the Navy, in processing appellant's request for discharge, dated January 24, 1967, did not follow certain of the procedures set forth in its own regulations (Tr. I, p. 4, Petition p. 3).

1/ During the course of this appeal, it is anticipated that appellant may be released from active duty and permitted to continue his schooling. However, he remains a member of the Naval Reserve, and the issues raised herein do not thereby become moot. The resolution of the issues herein is not affected by the fact that, pursuant to regulations, appellant may be under a different commanding officer now than at the time of filing his petition. Bishop v. The Medical Superintendent of the Iona State Hospital, etc., 377 F. 2d 467 at 468 (headnote 1) (6th Cir. 1967).

2/ Citations to the record will be made as follows:

To matter in Volume I of the Transcript of Record: Tr. I, p. _
To matter in the Reporter's Transcript: Tr. II, p. _
To matter found in Exhibits admitted into evidence,
as Petitioner's Exhibit I (Department of Defense Directive 1300.6): Pet. I, p. _
as Petitioner's Exhibit II (Bureau of Personnel Manual Article C-5210): Pet. II, p. _
as Petitioner's Exhibit III (letter from Chief of Naval Personnel to appellant's counsel dated March 23, 1967): Pet. III, p. _
as Respondent's Exhibit A: Resp. A, p. _

The custody is alleged to be in further violation of the laws and Constitution of the United States in that there is no basis in fact for the denial of the said request for discharge (Tr. I, p. 5).

This Honorable Court has jurisdiction to review on appeal the Order Denying Petition for Writ of Habeas Corpus pursuant to the terms of 28 U. S. C. §2253, the pertinent provisions of which read as follows:

> "In a habeas corpus proceeding before a circuit or district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit where the proceeding is had.
>
> "There shall be no right of appeal from such an order in a proceeding to test the validity of a warrant to remove, to another district or place for commitment or trial, a person charged with a criminal offense against the United States, or to test the validity of his detention pending removal proceedings.
>
> "An appeal may not be taken to the court of appeals from the final order in a habeas corpus proceeding where the detention complained of arises out of process issued by a State court, unless the justice or judge who rendered the order or a circuit justice or judge issues a certificate of probable cause."
> (emphasis added)

STATEMENT OF THE CASE

The Order Denying Petition for Writ sets out succinctly the essence of the case:

"The record shows that on February 23, 1966, petitioner reported for active duty, pursuant to order of the Navy Department dated January 7, 1966, and was assigned the duties of a Hospital Corpsman (L-8), non-combatant duty, by reason of his having been determined to be a conscientious objector (I-A-O). He has, since that date, been on active duty with the United States Navy.

"Petitioner, by voluntary enlistment, has been a member of the Naval Reserve since June 7, 1961. Prior to reporting for active duty on February 23, 1966, and on September 18, 1965, petitioner submitted a request for discharge (Resp. A, pp. 21-32) pursuant to the provisions of Department of Defense Directive (DOD) 1300.6 and Bureau of Naval Personnel Manual, Article C-5210. He stated in his request for discharge that it was 'not until the present time' that he knew his conscience would not permit him to serve in 'the context of the Armed Forces'.

"On January 7, 1966, the Chief of Naval Personnel notified petitioner's Commanding Officer that although petitioner's request for discharge had been denied, petitioner would be designated a conscientious objector and assigned Limited Duty Designator (L-8).

"Petitioner, on February 2, 1966, mailed to the Chief of Naval Personnel a letter (Resp. A, pp. 7-11) whereby he sought reconsideration of his request of September 18, 1965, and again urged that he be discharged from the Service. With the February 2nd letter, he submitted four letters of third parties in support of his position. In his February 2nd letter, petitioner acknowledged notice of disapproval of his September 18, 1965, request for discharge and expressed his inability ' * * * to accept your decision * * *'. He said he sent the first letter through administrative channels but was now ' * * * writing you direct to request a discharge on grounds of conscientious objection * * *'. In the next to the last paragraph on the first page of the February 2nd letter, petitioner states: 'I hope this additional material will be sufficient to warrant your careful reconsideration and subsequent reversal of said orders' (emphasis added). In the second paragraph of the portion of the letter numbered 7, page 5, petitioner states: 'I implore you to reconsider my case and grant me a discharge * * *. '

"By letter dated January 24, 1967 (Resp. A, p. 47) petitioner sent another request to the Chief of Naval Personnel, through his Commanding Officer, saying he had stated ' * * * the basis and evolution of my beliefs in great detail in my previous requests referenced in this letter * * * on file in your office'. With the January 24th letter, he

enclosed two letters from Navy Chaplains.

"The request for discharge, dated September 18, 1965, was in the form, and contained all of the detailed information, as required by the regulations referred to above, Article C-5210(2). The letters of February 2, 1966, and January 24, 1967, did not contain this detailed information but referred to the first letter.

"In accordance with the provisions of Article C-5210(2)(d), the Chief of Naval Personnel, on receipt of the September 18, 1965 request, referred the case to the Selective Service for advisory opinion. The Selective Service reported that on the basis of the information submitted by petitioner that if he were being considered for induction he would be classified I-A-O. The assignment of petitioner as Hospital Corpsman (noncombatant duty) as a conscientious objector followed the opinion of Navy Chaplain Ostrander with respect to how petitioner should be classified (Resp. A, p. 34)." (Tr. I, pp. 68-70).

The court below in effect concluded that the appellant's letter of January 24, 1967, did not constitute a new request for discharge because it did not re-state all of the matters set forth in the regulations dealing with requests for discharge.

It is conceded that the letter dated January 24, 1967, was not handled in accordance with regulations applicable to a request for discharge in that:

1. Appellant's commanding officer did not interview appellant. Bureau of Personnel Manual (hereinafter BuPers Man) C-5210(2)(b) (Pet. II, p. 3).

2. The commanding officer's endorsement did not express his opinion as to the sincerity of appellant. BuPers Man C-5210(2)(b) (Pet. II, p. 3; Resp. A, p. 41).

3. The Chief of Naval Personnel did not refer that request to the Selective Service. BuPers Man C-5210(2)(d) (Pet. II, p. 3; Pet. III, p. 1).

The facts here presented give rise to the following questions:

1. Did appellant's letter of January 24, 1967, with enclosures, constitute a "request for discharge"?

2. Was the Navy required to proceed in accordance with its own regulations in dealing with appellant's letter of January 24, 1967?

3. As of January 24, 1967, was there any evidence to support the conclusion that appellant was conscientiously opposed to participation in combatant military service but not conscientiously opposed to participation in non-combatant military service?

SPECIFICATION OF ERRORS

The court erred in the following particulars:

1. The court failed to find that the letter of January 24, 1967, taken together with the matters incorporated therein by reference, and the enclosures, constituted a "request for discharge".

2. The court failed to find that the Navy had violated its own regulations in dealing with the letter of January 24, 1967.

3. The court erred in finding that there was no change in appellant's beliefs after September 18, 1965 (Tr. I, p. 77).

4. The court erred in finding that there was a basis in fact for the classification given appellant after the processing of his letter of January 24, 1967 (Tr. I, p. 76).

ARGUMENT

I

APPELLANT'S LETTER OF JANUARY 24, 1967 WITH THE ITEMS ATTACHED THERETO AND THE MATERIAL INCORPORATED THEREIN BY REFERENCE CONSTITUTED A NEW REQUEST FOR DISCHARGE.

The effect of appellant's letter of January 24, 1967, is critical in the determination of the issues here presented. If that letter constitutes a "request for discharge" then certain consequences reasonably follow. Because of its crucial importance that letter is set forth here in full as follows:

"24 January 1967

"From: MINASIAN, Lawrence J., 546 43 43, HN, USNR

"To : Chief of Naval Personnel

"Via : Commanding Officer of US Naval Hospital in the USS HAVEN (AH-12)

"Ref : (1) BuPers spdltr Pers B2221/mbb of 7 January 1966 (NOTAL)
(2) Pers B2221/irn

"Subj : Request for discharge for reason of conscientious objection

"Enc : (1) LCDR Robert L. Bigler, CHC, USN, letter of 20 January 1967
(2) LCDR Jack E. Six, CHC, USN, Memorandum of 17 January 1967
(3) Eugene Carson Blake, Stated Clerk of the United Presbyterian Church, letter of 14 September 1965
(4) Howard C. Maxwell, Office of Church and Society of the United Presbyterian Church, letter of 15 September 1965

"1. I request to be discharged form the United States Naval Reserve by reason of conscientious objection to military service. During the last year I have performed

my duties to the best of my ability and have cooperated in every way with the Navy. I now find that a conscience is not easily laid to rest and that I must again pursue this matter with my whole being regardless of consequence. My hope is that, given a country such as ours founded on the principle of religious freedom there is room for men of minority view point to dissent. Therefore, I am making this third appeal for discharge.

"2. I have stated the basis and evolution of my beliefs in great detail in my previous requests referenced in this letter and on file in your office. I stated them there as clearly as I am able. It is folly for me to attempt to prove to you that my objection to military service is my response to God's Love. Such a thing cannot be proven. Indeed, it is just as impossible to prove God's existence, or that I love my wife, or that I have faith, as it is to prove that my objection is bonafide.

"3. With this request I have included statements from two Presbyterian Navy Chaplains concerning my request. Also included with this request are letters from the then Stated Clerk of the United Presbyterian Church and the Office of Church and Society of same stating that I have the support of my Church in taking this stand. I hope that the enclosed statements along with the information included in my previous statements will be an aid to you in considering my case.

"4. I again reaffirm my willingness to complete my obligation through civilian alternate service. Please review my previous requests. What is written therein is just as true today as when I wrote it.

Respectfully yours,

Lawrence John Minasian

Lawrence John Minasian"

On its face the letter of January 24, 1967, states "I am making this third appeal for discharge", and "I have stated the basis and evolution of my beliefs in great detail in my previous requests referenced in this letter and on file in your office". The intent to incorporate by reference material previously submitted is clear.

The material to be incorporated is identified with certainty.

The contents of a request for discharge under these circumstances are specified in BuPers Manual C-5210(2)(a) (Pet. II, p. 2) which states that "Each request for discharge will be accompanied by a statement from the member containing the following information":

"1. General Information:

"a. Full Name

"b. Service Number

"c. Selective Service Number

"d. Duty Station

"e. Permanent Home Address

"f. Give the name and address of each school and college which you have attended, together with the dates of your attendance, and state in each instance the type of school (public, church, military, commercial, etc.).

"g. Give a chronological list of all occupations, positions, jobs, or type of work, other than as a student in school or college, in which you have at any time been engaged, whether for monetary compensation or not, giving the type of work, name of employer, address of employer, and the from/to date for each position or job held.

"h. Give all addresses and dates of residence where you have formerly lived.

"i. Give the name and address of your parents and indicate whether they are living or deceased.

"j. State the religious denomination or sect of your father and mother.

"k. Did you apply to the Selective Service System (local board) for classification as a conscientious objector prior to entry into the Armed Forces? To which local board? What decision was made by the board, if known?

"l. If you have served less than 180 days in the military service and are discharged as a conscientious objector, are you willing to perform work under the Selective Service Conscientious Objectors' Work Program? Yes __ No __.

"Will you consent to the issuance of an order for such work by your local Selective Service Board? Yes ___ No ___.

"2. Religious Training and Belief:

"a. Do you believe in a Supreme Being?

"b. Describe the nature of your belief which is the basis of your claim, and state whether or not your belief in a Supreme Being involves duties which to you are superior to those arising from any human relation.

"c. Explain how, when, and from whom or from what source you received the

training and acquired the belief which is the basis of your claim.

"d. Give the name and present address of the individual upon whom you rely most for religious guidance.

"e. Under what circumstances, if any, do you believe in the use of force?

"f. Describe the actions and behavior in your life which in your opinion most conspicuously demonstrate the consistency and depth of your religious convictions.

"g. Have you ever given public expression, written or oral, to the views herein expressed as the basis for your claim? If so, specify when and where.

"3. Participation in Organizations:

"a. Have you ever been a member of any military organization or establishment before entering the naval service for this tour? If so, state the name and address of same and give reasons why you became a member.

"b. Are you a member of a religious sect or organization? If your reply is 'yes' -

"1. State the name of the sect, and the name and location of its governing body or head, if known to you.

"2. When, where, and how did you become

a member of said sect or organization?

"3. State the name and location of the church, congregation, or meeting where you customarily attend.

"4. Give the name, title, and present address of the pastor or leader of such church, congregation, or meeting.

"5. Describe carefully the creed or official statements of said religious sect or organization in relation to participation in war.

"(c) Describe your relationships with and activities in all organizations with which you are or have been affiliated, other than military, political, or labor organizations.

"4. References: Give the name, full address, occupation or position, and relationship to you, of persons who could supply information as to the sincerity of your professed convictions against participation in war."

The letter from appellant dated September 18, 1965, which the appellant and all parties hereto considered to be a complete request for discharge, answers each item in full. That letter was written and sent through channels, with attachments, while appellant was still on inactive status, prior to his being activated (Resp. A, pp. 21-37).

The letter from appellant dated February 2, 1966, still prior

to his activation, referred on its face to the previous request for discharge, included additional statements by the appellant concerning his religious views, and submitted several letters in support of the reviewed request for discharge (Resp. A, pp. 7-14).

The statement of intention, in the letter of January 24, 1967, to incorporate therein specifically identified material which had previously been submitted to the same authority (Chief of Naval Personnel), is unequivocal. Does such a clearly stated intention suffice to incorporate the previously submitted material?

An analogous situation is presented by amended pleadings which incorporate therein by reference matter set out in earlier pleadings. In this regard Rule 10(c) of the Rules of Civil Procedure provides:

> "(c) ADOPTION BY REFERENCE; EXHIBITS. Statements in a pleading may be adopted by reference in a different part of the same pleading or in another pleading or in any motion. A copy of any written instrument which is an exhibit to a pleading is a part thereof for all purposes."

In its commentary on the rule, Moore's Federal Practice Second Edition, 1967, makes the following observation in volume 2A at page 2013:

> "Par. 10.05. Adoption by Reference.
>
> "Although the practice of referring to statements in a pleading by the designation of the paragraph

in which such statements are to be found is an obvious convenience to a pleader and eliminates repetition, the older point of view reflected the common-law notion that such reference was not effective [citations]. The modern view is that stated in the first sentence of Rule 10(c) - that 'Statements in a pleading may be adopted by reference in a different part of the same pleading or in another pleading or in any motion' [citations]. Such a mode of pleading should be encouraged, since it avoids the repetition and redundancy that otherwise exists.

"Courts have generally held that the reference must be clear and explicit before incorporation by reference is effective [citations]. For example, incorporation in a counterclaim of 'all of the allegations contained in this amended answer' has been held improper where the allegations thus incorporated were 'scattered through paragraphs which in part deny allegations of the Complaint' and where, in addition, some of the incorporated paragraphs themselves contained incorporations of previous paragraphs [citations]. It has also been held that it is not permissible to incorporate by reference in an amended pleading, exhibits attached to the original pleading [citations], although this seems questionable. An arbitrary standard, however, should not be insisted

on. The proper test should be one of certainty: is it clear what statements are meant to be adopted? Any designation which accomplishes this should be satisfactory under the standard of liberal construction laid down in Rule 8(f)."

The appellant should not be held to a stricter technical procedure in submitting his request for discharge than is an attorney in the preparation of pleadings under the Federal Rules.

The letter of January 24, 1967, is clear and explicit as to the matters incorporated therein by reference. Taken together with its contents and enclosures it fulfills all the requirements of the applicable regulations as a new and complete request for discharge.

II

THE LETTER OF JANUARY 24, 1967, DEMONSTRATED A SUBSTANTIAL CHANGE IN APPELLANT'S VIEWS AS COMPARED WITH THOSE SET FORTH IN HIS PREVIOUS REQUEST FOR DISCHARGE.

The letter of January 24, 1967, which is set out in full above, on its face asserts:

"During the last year I have performed my duties to the best of my ability and have cooperated in every way with the Navy. I now find that a conscience is not easily laid to rest and that I must again pursue this matter with my whole being regardless of consequence."

Letters from two Chaplains were submitted with the appellant's letter of January 24, 1967. The letter from Jack E. Six, LCDR, CHC, USN, dated January 17, 1967, makes the following material assertions (Resp. A, p. 44):

1. Appellant had "over the past year sought the counsel and guidance of the Naval Station Chaplain's Office in his desire to be classified as a conscientious objector".

2. Appellant on January 24, 1967, had been referred to Chaplain Six for "assistance in making another request for classification".

3. In the opinion of Chaplain Six as of January 17, 1967, appellant "is sincere and devoted to his personal convictions concerning military service. His position is now marked by an unwillingness to serve even as a non-combatant." (emphasis added)

The letter from Robert L. Bigler, Hospital Chaplain dated January 20, 1967 (Resp. A, p. 43) reads as follows:

"20 January 1967

"From: LCDR Robert L. BIGLER, CHC, USN, 571073/460
"To : Whom It May Concern

"Subj : MINASIAN, Lawrence J., 546 43 43 HN, USNR: Request for classification as a Conscientious Objector

"1. I have on many interviews with MINASIAN come to the conclusion that he is a devout, sincere follower of Jesus Christ within the framework of the United Presbyterian Church. He has come to me with a request for assistance in obtaining a discharge from the United States Navy because of his conscientious belief that he should not even

wear the same uniform as those who are in a combatant status in the Armed Forces and that to do so violates the religious teaching of the Church and his Lord. I am convinced of his sincerity and have reviewed the logical process with him which requires he take this stand.

"2. As a United Presbyterian minister serving on active duty as a chaplain, as is Chaplain Six (who has seen this man for a longer period), I must state that our Church does make a provision for those who take such a stand and that MINASIAN has registered his belief in the conscientious objector position he has taken with the Stated Clerk of the General Assembly of our Church in Philadelphia, in September of 1965. The intense religious turmoil in still remaining in the Naval Service is a great burden on this man. He has suffered much mental anguish in taking his stand.

"3. I strongly recommend that MINASIAN'S request for discharge as a conscientious objector be granted for the good of the man and the Naval Service.

Robert L. Bigler

ROBERT L. BIGLER
HOSPITAL CHAPLAIN"

The regulations relating to request for discharge on their face do not apply to persons whose conscientious objections existed before enlistment. The regulations obviously contemplate the possibility of changes in the views of members of the armed services, after enlistment or activation, on the subject of conscientious objection.

We have no choice but to assume that the chaplain (Resp. A, p. 34) and the commanding officer (Resp. A, p. 33) who interviewed appellant concerning his first request for discharge dated September 18, 1965, properly concluded that he was then conscientiously opposed to combatant duty. Their recommendations were forwarded

to the Chief of Naval Personnel (Resp. A, p. 38), then to Selective Service (Resp. A, p. 18). "Based on the information in this file", Lewis B. Hershey, as Director of Selective Service, concluded that appellant "would be properly classified in Class 1-A-O, as a conscientious objector, if he were being considered for induction at this time" (Resp. A, p. 17).

Appellant's letter of January 24, 1967 and the enclosed letters from the Chaplains clearly demonstrate that appellant had moved from his earlier position to a position which was, according to Chaplain Jack E. Six, "now marked by an unwillingness to serve even as a non-combatant" (emphasis added; Resp. A, p. 44). The difference is one of intensity of belief and a changed conviction as to where he must draw the line.

A comparison of the statement of LCDR Donald H. Ostrander (Resp. A, p. 34), which was forwarded with appellant's first request for discharge, with the letters of Chaplains Bigler and Six (Resp. A, pp. 43 and 44), which were submitted with appellant's letter of January 24, 1967, shows a marked change in point of view.

Appellant in the hearing in the District Court was permitted to testify concerning the change in his position which occurred in January 1967, just prior to filing his letter of January 24, 1967. This testimony was admitted only after respondent had conceded that appellant's commanding officer did not interview him following the submission of that letter; and it was admitted to permit the court to hear from appellant what the Commanding Officer could have heard had he interviewed appellant.

In Webster's New World Dictionary of the American Language, College Edition (1964), p. 312, "conscience" is defined as follows:

> "A knowledge or feeling of right and wrong, with a compulsion to do right; moral judgment that prohibits or opposes the violation of a previously recognized ethical principle."

Most people recognize the validity of the ethical principle: "Thou shalt not kill!"; some have conscientious convictions which prohibit participation in combatant military service; others have conscientious convictions which prohibit participation in any capacity in any branch of the military service. This variation in the level of conscientious objection to participation in war is recognized by the Selective Service and Training Act (Title 50, U.S.C. App. §456(j)) and by the regulations cited above.

The conclusion of the court below that "There is no indication of change" in appellant's beliefs since September 18, 1965, is unfounded and is unsupported by the evidence. The event of January 8, 1967, involving "the determination on the part of the petitioner to implement his beliefs by action, to wit, refusal to continue on non-combatant service status" (Tr. I, p. 63) represents the very change in position which was recognized by the creation of classifications 1-O and 1-A-O in the Selective Service system.

With or without the testimony of appellant in the hearing in the District Court, the record clearly establishes that significant changes had occurred in appellant's position subsequent to his

activation and just prior to his submission of his letter of January 24, 1967.

III

IN THE PROCESSING OF APPELLANT'S LETTER OF JANUARY 24, 1967, THE PERTINENT NAVY REGULATIONS WERE VIOLATED.

As has been set forth above, following the submission of his letter of January 24, 1967, with enclosures, the appellant was not interviewed by his commanding officer, the endorsement of the commanding officer did not state an opinion as to the sincerity of appellant, and appellant's said request was not submitted to Selective Service for its review and recommendation.

Assuming that the letter of January 24, 1967, constituted a request for discharge, these omissions were in direct violation of the required procedures as set forth in BuPers Man C-5210 (Pet. II, Article C-5210(2)(b) and (d)).

The Chief of Naval Personnel did not forward the request of January 24, 1967 to Selective Service. In a letter to appellant's counsel, an officer acting at the direction of the Chief of Naval Personnel justified this failure to follow regulations in the following manner (Pet. III, p. 1):

> "After a careful review of the circumstances of his requests, it has been determined that no additional substantive information has been submitted which would warrant a reversal of the previous decision

rendered in his case. His request was not forwarded to the Director, Selective Service because there was no new evidence which warranted such referral." (emphasis added) Appellant's letter of January 24, 1967, was not referred to Selective Service, not because it was not a suitable request for discharge, but because it contained "no new evidence which warranted such referral".

In view of the preceding discussion, it is clear that the letter of January 24, 1967, with enclosures, did indeed present new evidence which, if accepted by Selective Service in the same manner in which Selective Service accepted the first request for discharge, would have led to a recommendation by Selective Service that appellant should be discharged.

The office of the Chief of Naval Personnel either did not read the letters from the two chaplains or did not comprehend the significance of the opinions expressed therein. In either event the fact that appellant's file containing his letter of January 24, 1967, was not forwarded to Selective Service, is undenied.

A. This Violation of Regulations Denies Appellant Due Process of Law and Equal Protection of Law.

Appellant concedes that no legislation confers upon him or on anyone else a right to be discharged from military service by reason of conscientious objection. However, the Navy has, pursuant to the direction of the Department of Defense, adopted Article C-5210. The declared purpose of DOD Directive 1300.6 is to establish

"uniform procedures for the utilization of conscientious objectors in the Armed Forces and consideration of requests for discharge on the grounds of conscientious objection" (Pet. I, p. 1).

The Order Denying Petition for Writ of Habeas Corpus cites the recent case of Brown v. McNamara, 263 F. Supp. 686 (D. C. N. J. 1967), as authority for the proposition that the Court has no jurisdiction to review the ruling of the Chief of Naval Personnel in this matter. However, a careful reading of the Brown decision discloses that the court there concluded that the pertinent regulations had been followed in the disposition of Brown's request for discharge. That decision specifically supports the propositions upon which appellant here relies (263 F. Supp. at p. 691):

> "However, even though the Constitution does not require a procedure whereby post-induction conscientious objectors can have their claims passed upon, once such a procedure is established and put into operation it must be administered in a manner which provides equal protection of laws [1] to all those to whom it is open. Cf. Griffin v. People of State of Illinois, 351 U. S. 12, 18, 76 S. Ct. 585, 100 L. Ed. 891 (1956).
>
> "1. See Bolling v. Sharpe, 347 U. S. 497, 74 S. Ct. 693, 98 L. Ed. 884 (1954) which appears to incorporate the equal protection clause into the fifth amendment."

Having concluded that the appropriate regulations were followed, the court in Brown refused to review the factual basis for

the determination. To be consistent with the Brown decision here would require the granting of appellant's petition.

The failure to follow regulations constitutes a denial of due process of law and of equal protection of the law to appellant.

IV

AS OF JANUARY 24, 1967, THERE WAS NO SUBSTANTIAL EVIDENCE TO SUPPORT APPELLANT'S CLASSIFICATION AS AN OBJECTOR ONLY TO COMBATANT MILITARY SERVICE.

When the appellant's letter of January 24, 1967, was forwarded to the Chief of Naval Personnel, it incorporated by reference his previous statements as to his religious beliefs, supplemented by a statement by the appellant as to his religious development during his period of active duty, and two letters from chaplains confirming their belief in his sincerity and recommending his discharge.

Had the regulations been followed, and had the Commanding Officer interviewed appellant, he may have concluded that appellant was not sincere. In that event the Commanding Officer presumably would have expressed that adverse opinion in forwarding the matter to the Chief of Naval Personnel; such adverse opinion would have provided a basis in fact for a denial of appellant's request for discharge. But that is pure speculation. The record discloses no facts whatsoever upon which to base the conclusion that appellant as of January 24, 1967, was conscientiously opposed to participation in non-combatant military service, but was not conscientiously opposed

to participation in all forms of military service.

V

APPELLANT IS ILLEGALLY HELD IN CUSTODY.

Arbitrary and capricious actions on the part of military authorities in dealing with members of our citizen armed forces are no less tolerable than arbitrary and capricious actions by Selective Service Boards, prior to induction. Decisions of the Chief of Naval Personnel, made in violation of regulations and without a basis in fact are not final where, as in Estep v. United States, 327 U.S. 144 (1945), at page 122, " . . . we are dealing . . . with a question of personal liberty".

In Estep the Court concluded that the defendant's conviction must be set aside because the defendant had been denied the opportunity to establish that the order for induction, which he had violated, was void because the Selective Service Board had exceeded its jurisdiction in issuing the order. The Board acted in excess of its jurisdiction because there was "no basis in fact for the classification which it gave the registrant" (327 U.S. at p. 122). The Court assumed that Estep could obtain release by habeas corpus after induction, and held that he should be entitled to the defense of lack of jurisdiction to avert a situation "that requires the court to march up the hill when it is apparent from the beginning that they will have to march down again" (p. 125).

Habeas corpus is the appropriate remedy to obtain release

from military service after induction pursuant to a Selective Service Board order made in excess of the Board's jurisdiction. Habeas corpus is likewise the appropriate remedy where the denial of a request for discharge is made pursuant to procedures which deny equal protection of the law and in a setting where there is no basis in fact for the classification which results.

CONCLUSION

The denial of appellant's request for discharge was reached in violation of applicable regulations and without a basis in fact for the denial. Appellant is presently in custody in violation of the Constitution of the United States, and should be discharged forthwith from service in the United States Navy or the Naval Reserve in any capacity.

Respectfully submitted,

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Attorney for Appellant.

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ Richard W. Petherbridge
RICHARD W. PETHERBRIDGE